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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FRANK J. RUCKER,

Plaintiff,

vs.

E.K. McDANIEL, et al.,

Defendants.

3:04-CV-120-ECR (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Defendant Governor Kenny Guinn's Motion for Judgment on the Pleadings (Doc. #60). Plaintiff has filed an opposition (Doc. #71) and Defendant has responded (Doc. #77). Having read the papers, and carefully considered the arguments and the relevant legal authority, and good cause appearing, it is recommended that the District Court grant the motion.

I. BACKGROUND

At the time of the events underlying his allegations, Plaintiff was an inmate at Ely State Prison. Plaintiff brings various claims related to the deprivation of his civil rights by prison officials under 42 U.S.C. § 1983, as well as pendant state law claims alleging negligence and gross negligence. (Doc. #14.) At this point in the proceedings, the bulk of Plaintiff's federal claims have been dismissed. The only remaining federal claim is Count VI from his original complaint, alleging various violations of Plaintiff's Fourteenth Amendment rights.

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1 The claims relevant to this motion are based on state law over which the court exercises
2 supplemental jurisdiction. Plaintiff pleads negligence and gross negligence claims against
3 Defendant and seeks damages amounting to \$50,000. These claims are based on Defendant's
4 failure as Board President to properly train and supervise various correctional officers at Ely
5 State Prison. Further, Plaintiff alleges that Defendant failed to investigate and correct the
6 conduct responsible for Plaintiff's damages, and that Defendant allowed "conditions, attitudes,
7 and reckless disregard" for complying with prison regulations. Plaintiff characterizes
8 Defendant's duties in this regard as "ministerial." (Doc. #14 at 27.)

9 III. DISCUSSION

10 A motion brought under Federal Rule of Civil Procedure 12(c) tests the legal sufficiency
11 of the opposing party's pleadings after the pleadings are closed. Such a motion is appropriate
12 when assuming the truth of all material facts alleged by the responding party, the moving party
13 is entitled to judgment as a matter of law. *Hal Roach Studios v. Richard Feiner & Co.*, 896
14 F.2d 1542, 1550 (9th Cir. 1989). All inferences that may be reasonably drawn from the facts
15 contained in the complaint should be construed in favor of Plaintiff. *General Conference Corp.*
16 *of Seventh-Day Adventists v. Seventh Day Adventist Congregation Church*, 887 F.2d 228, 230
17 (9th Cir. 1989). Allegations of a pro se complaint are held to less stringent standards than
18 formal pleadings drafted by a lawyer. *Haines v. Kerner*, 404 U.S. 519 (1972). However,
19 sweeping conclusory allegations will not suffice. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.
20 1988).

21 Defendant argues that under Nevada law, he possesses sovereign immunity because the
22 claims against him are based on the exercise of his discretion. (Doc. #60 at 14.) The State of
23 Nevada has generally waived its sovereign immunity from liability. *Martinez v. Maruszczak*,
24 168 P.3d 720, 723 (Nev. 2007) (citing Nev. Rev. St. § 41.031 (2007)). The legislature has,
25 however, set out certain exceptions to this general waiver of liability. At issue here is a
26 provision granting immunity to officials exercising discretionary functions:

27 [N]o action may be brought ... against an immune contractor or an officer or
28 employee of the state or any of its agencies or political subdivisions which is:
...

1 2. Based upon the exercise or performance or the failure to exercise or perform
2 a discretionary function or duty on the part of the state or any of its agencies or
3 political subdivisions or of any officer, employee or immune contractor of any of
4 these, whether or not the discretion involved is abused.

5 Nev. Rev. St. § 41.032 (2007). Immunity in this case turns on two issues: (1) whether the actor
6 in question was a state employee or agent, and (2) whether the employee's acts fall within the
7 discretionary function exception to the general waiver of sovereign immunity. *See Martinez*,
8 168 P.3d at 725.

9 Plaintiff's complaint identifies Defendant in his capacity as President of the Nevada
10 Board of Prison Commissioners (NBPC), the entity governing the Nevada Department of
11 Corrections. (Doc. #14 at 26.) The conduct underlying Plaintiff's allegations occurred in the
12 course of Defendant discharging his duties as an employee of the state overseeing a state
13 facility. The court therefore concludes that the state employment requirement for sovereign
14 immunity is satisfied.

15 Whether Defendant's alleged conduct falls within the scope of Nevada's sovereign
16 immunity provision is a closer question. Resolving this issue depends on whether Defendant's
17 actions may be properly characterized as "discretionary" rather than ministerial in nature. *See*
18 Nev. Rev. St. § 41.032. The Nevada Supreme Court recently clarified the standard for analyzing
19 claims for immunity under this provision that mirrors the *Berkovitz-Gaubert* test employed
20 by federal courts when applying the Federal Tort Claims Act. *See Martinez*, 168 P.3d at 727
21 (citing *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States*, 486 U.S. 531
22 (1988)). "[T]o fall within the scope of discretionary-act immunity, a decision must (1) involve
23 an element of individual judgment or choice and (2) be based on considerations of social,
24 economic, or political policy." *Id.* at 729. Elaborating on the second prong of the test, the court
25 noted that the focus of the inquiry was not on the employee's subjective intent in exercising the
26 relevant discretion, but rather whether the nature of the actions were susceptible to policy
27 analysis. *Id.* at 728. In other words, "if the injury-producing conduct is an integral part of
28 government policy-making or planning, if the imposition of liability might jeopardize the
 quality of the governmental process, or if the legislative or executive branch's power or

1 responsibility would be usurped, immunity will likely attach under the second criterion.” *Id.*
2 at 729 (citing *Horta v. Sullivan*, 4 F.3d 2, 19 (1st Cir. 1993)).

3 Defendant’s conduct falls within the scope of Nevada’s sovereign immunity doctrine.
4 According to state law, the NBPC has the following responsibilities:

5 The Board [of Prison Commissioners] has full control of all grounds, buildings,
6 labor, and property of the Department [of Corrections], and shall:

7 1. Purchase, or cause to be purchased, all commissary supplies, materials and
8 tools necessary for any lawful purpose carried on at any institution or facility of
9 the Department.

10 2. Regulate the number of officers and employees of the Department.

11 3. Prescribe regulations for carrying on the business of the Board and the
12 Department.

13 Nev. Rev. St. § 209.111 (2007). The statute also requires the state governor to be the president
14 of the board. Nev. Rev. St. § 209.101 (2007). Defendant’s responsibilities as President of the
15 NBPC meet both prongs of the *Berkovitz-Gaubert* analysis. First, Defendant had to exercise
16 his individual judgment and discretion while on the Board. Assuming that Defendant failed
17 to regulate the officers’ conduct and permitted prison rules to be disregarded, it was while
18 performing the duties outlined above, as he had no direct relationship to the correctional
19 officers named in the complaint. In this role, Defendant did not perform ministerial acts,
20 which are characterized by following orders or performing a duty involving minimal
21 decisionmaking by the individual officer. *See Board of County Comm’rs v. Cirac*, 98 Nev. 57,
22 59 (1982). Instead, Plaintiff had to exercise considerable judgment formulating policies for the
23 prison system. The complexity of this task explains why the legislature required the governor
24 to preside over the NBPC.

25 To be eligible for sovereign immunity, Plaintiff’s conduct must also be based on
26 “considerations of social, economic, or political policy.” *Martinez*, 168 P.3d at 729. Prescribing
27 regulations, making purchase decisions, and regulating the number of personnel are acts of
28 policymaking that require the evaluation of “multiple social, economic, efficiency, and planning
concerns.” *Butler v. Bayer*, 168 P.3d 1055, 1067 (Nev. 2007). Permitting liability in this
situation would have an adverse effect on the government process, as members of the NBPC
would be confronted with the possibility that they could be sued by a prisoner who disagreed

1 with a regulation. Preventing this type of judicial interference is the very purpose of the
2 sovereign immunity exception. *Martinez*, 168 P.3d at 729 (holding that courts “must assess
3 cases on their facts, keeping in mind [the purposes of] the exception: ‘to prevent judicial
4 “second guessing” of legislative and administrative decisions grounded in social, economic, and
5 political policy through the medium of an action in tort.” (quoting *Coulthurst v. U.S.*, 214 F.3d
6 106, 111 (2d Cir. 2000))). Therefore, Defendant’s conduct is protected by sovereign immunity.

7 Plaintiff argues that the court has already ruled upon this issue and that it is
8 consequently barred by the doctrines of res judicata and law of the case. Plaintiff is incorrect.
9 While Defendant’s sovereign immunity arguments were raised in a previous motion to dismiss
10 (Doc. #17), they were never adjudicated on the merits. As a result of recommending that the
11 district judge dismiss all the federal claims in this action, this court also recommended that
12 supplemental jurisdiction be declined over Plaintiff’s state law claims. (Doc #31 at 10.) The
13 federal claims were not dismissed in their entirety, and hence Plaintiff’s state law claims were
14 never dismissed from the lawsuit. This was not a ruling on the merits that would permit
15 applying the law of the case doctrine, which requires the issue in question to have been
16 “decided explicitly or by necessary implication in [the] previous disposition.” *Milgard*
17 *Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990) (quoting *Liberty*
18 *Mutual Ins. Co. v. E.E.O.C.*, 691 F.2d. 438, 441 (9th Cir. 1982)). Plaintiff cannot resort to res
19 judicata, as there has neither been a prior final judgment nor an adjudication on the merits.
20 See *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.2d 525, 528 (9th Cir. 1998).

21 Finally, Defendant quotes an authority discussing a defendant’s ineligibility for
22 sovereign immunity when sued in an individual capacity under 42 U.S.C. § 1983. See Doc. #71
23 at 7 (citing *Ruley v. Nevada Board of Prison Commissioners*, 628 F.Supp. 108, 110 (D.Nev.
24 1986)). That case discusses sovereign immunity under the Eleventh Amendment in an action
25 under § 1983, not sovereign immunity for state law claims. While the defendant’s capacity is
26 relevant in a § 1983 action because of the statutory construction of the word “person”, see *Will*
27 *v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989), that distinction is not relevant to
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1 NRS § 41.0132, which turns on whether the state official's conduct was discretionary in nature.
2 *See City of Boulder v. Boulder Excavating, Inc.*, 191 P.3d 1175, 1180-81 (Nev. 2008) (upholding
3 finding of sovereign immunity under NRS § 41.032(2) where defendant was named in
4 complaint in his individual capacity).

5 The court finds that the discretionary function-exception to the State of Nevada's general
6 waiver of sovereign immunity applies in this case. Because he is immune from suit, judgment
7 on the pleadings should be entered in favor of Defendant Guinn. The court need not consider
8 the other defenses raised by Defendant at this point in time.

9 **IV. RECOMMENDATION**

10 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order
11 **GRANTING** Defendant Governor Kenny Guinn's Motion for Judgment on the Pleadings
12 (Doc. #60).

13 The parties should be aware of the following:

14 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the
15 Local Rules of Practice, specific written objections to this Report and Recommendation within
16 ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's
17 Report and Recommendation" and should be accompanied by points and authorities for
18 consideration by the District Court.

19 2. That this Report and Recommendation is not an appealable order and that any
20 notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the
21 District Court's judgment.

22 DATED: December 5, 2008.

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25 UNITED STATES MAGISTRATE JUDGE
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